IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
November 27, 2007 Session

DAVID WAYNE HEARING v. STATE OF TENNESSEE

Direct Appeal from the Criminal Court for Greene County
No. 05CR406 John Dugger, Jr., Judge

No. E2007-00778-CCA-R3-PC - Filed February 22, 2008

The petitioner, David Wayne Hearing, pled guilty to two counts of first degree felony murder and received concurrent life sentences. He subsequently filed a Tennessee Rule of Criminal Procedure 32(f) motion to withdraw his guilty pleas, which was denied by the trial court. He alleges on appeal that he should have been allowed to withdraw his pleas because they were unknowing and involuntary, and his counsel's assistance was ineffective. Following our review, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

ALAN E. GLENN, J., delivered the opinion of the court, in which NORMA MCGEE OGLE and D. KELLY THOMAS, JR., JJ., joined.

Brent Hensley, Greeneville, Tennessee, for the appellant, David Wayne Hearing.

Robert E. Cooper, Jr., Attorney General and Reporter; Rachel West Harmon, Assistant Attorney General; C. Berkeley Bell, Jr., District Attorney General; and Connie Trobaugh, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

The petitioner pled guilty and was sentenced on September 2, 2005. On September 30, 2005, he filed a *pro se* motion to withdraw his guilty pleas, alleging that he had an irreconcilable conflict of interest with his appointed counsel, who coerced him into accepting the plea agreement and informed him incorrectly regarding the length of his sentence. The trial court treated this motion as a petition for post-conviction relief and dismissed it after conducting an evidentiary hearing. On appeal, this court held that the trial court erred in treating the motion as a petition for post-conviction relief and remanded for reconsideration. David Wayne Hearing v. State, No. E2006-00362-CCA-

R3-PC, 2006 WL 3813625, at *1 (Tenn. Crim. App. Dec. 28, 2006). On remand, the trial court denied the motion based on the evidence adduced at the initial evidentiary hearing.

At the evidentiary hearing, lead counsel testified that when he was appointed to represent the petitioner, he had practiced law for over twenty years and handled approximately six to eight capital cases. He said that during the course of his representation he spoke with the petitioner approximately fifty times. He recalled that the only times that the petitioner expressed dissatisfaction with his representation were when he filed the motion to remove counsel and when they met to discuss the motion.

At their meeting regarding the petitioner's motion to remove counsel, the petitioner told lead counsel that he felt he was not being represented properly. Lead counsel told the petitioner that he and co-counsel understood his concerns and felt confident that he would be satisfied with their efforts but understood if he wished to hire another attorney. He denied telling the petitioner that he would put more effort into the case. He testified that a member of the petitioner's family filed a complaint with the Board of Professional Responsibility regarding his representation, but he did not discuss the matter with the petitioner.

Lead counsel testified that the petitioner was initially "adamant" about not pleading guilty but drastically changed his mind after learning that a codefendant would testify against him. He acknowledged telling the petitioner that the State's "intention was to try to kill him" but said he made this remark to emphasize that the death penalty was a real possibility. He remembered telling the petitioner something like "it was a turkey shoot and he was the turkey." He thought that such statements had an effect on the petitioner's reasoning but denied pressuring the petitioner to accept a plea agreement.

Lead counsel testified that he explained to the petitioner that he would serve fifty-one years before being eligible for parole. He said he never told the petitioner he could be eligible for parole in twelve to fifteen years. Counsel said he traveled to Texas with an investigator in late June or early July 2005 to gather evidence and speak with witnesses. Counsel testified that his fee statement filed with the Administrative Office of the Courts, which listed a total of 318.6 out-of-court and 6.1 in-court hours worked on the case, was accurate.

On cross-examination, lead counsel testified that the trip to Texas yielded some potential impeachment evidence against some of the State's witnesses, but the trip did not produce a great deal of evidence that would discredit the State's position on the primary issues of the case. He denied ever telling the petitioner that he was not going to help him.

Co-counsel testified that he had practiced law since 1994 and had worked on five or six capital murder cases before being appointed to represent the petitioner. He recalled visiting the petitioner at least nine times and that each meeting lasted "a number of hours" because they had a large volume of discovery to discuss. He said that the petitioner initially indicated that he did not wish to accept a plea, but changed his mind after learning that a codefendant was planning to testify

against him. Co-counsel explained that he and lead counsel sent a letter to the petitioner on July 28, 2005, outlining specific concerns about the evidence and the stronger points of the State's case. He said the purpose of the letter was "to do a reality check" and make sure the petitioner understood what would be presented to the jury at trial.

After counsel learned that the petitioner had filed a motion to remove them, both attorneys met with the petitioner in jail to discuss the motion. At the end of the discussion, the petitioner said he wanted lead counsel and co-counsel to continue to represent him. Co-counsel testified that he was unable to discuss the plea agreement with the petitioner because he was on vacation when the petitioner elected to plead guilty. He said he was confident that he did not exert any pressure on the petitioner to accept a guilty plea.

On cross-examination, co-counsel testified that when he and lead counsel met with the petitioner they discussed possible outcomes, including a death sentence, life with parole, life without parole, and a guilty verdict on a lesser-included offense. When discussing the possibility of life with parole, co-counsel remembered explaining that it was different from life without parole because the former sentence carried the possibility of release after fifty-one years. He denied that he or lead counsel ever told the petitioner that he could be eligible for parole in twelve to fifteen years.

The petitioner testified that he filed his motion to withdraw his guilty pleas because his attorneys were ineffective and he was told that he would be eligible for parole after twelve to fifteen years. He said that co-counsel was ineffective because he visited him only three times, and lead counsel was ineffective because he "never really went over anything" and delayed traveling to Texas. He asserted that both attorneys should have communicated with him more frequently and put additional effort into challenging the search warrant in the case.

The petitioner introduced as an exhibit to his testimony his log of attorney visits and testified that his records did not coincide with the records kept by lead counsel. The petitioner's records indicated that lead counsel had visited him seventeen times, whereas lead counsel's records reflected thirty-eight meetings. The petitioner further testified that their meetings generally lasted between twenty and thirty minutes rather than the 1.2 to 1.4 hours reflected in lead counsel's log.

The petitioner testified that he filed his motion to remove counsel because he was dissatisfied with his counsel's investigation of the case and performance at a hearing to suppress evidence derived from the search warrant. He said he asked his attorneys to travel to Texas before the suppression hearing to gather additional evidence, but they did not do so. He testified that when he told them he was dissatisfied, his attorneys said, "Well, we probably didn't do as much as we could've but, you know, we promise we'll do it from now on." The petitioner lacked confidence in lead counsel's ability "[b]ecause he never put forth the effort saying what defense was [sic] or how we were going about things or anything." He said neither attorney ever developed a defense strategy for him.

The petitioner testified that he did not decide to accept the plea agreement until the morning of the guilty plea hearing. He testified that lead counsel and the investigator had visited him in jail three times during the previous week, "drilling" him about taking a plea and telling him he was "stupid" if he refused and that the State would kill him. He said he understood the July 28 letter to mean that his attorneys had given up and were going to make sure that he pled guilty. He attempted to remedy the situation by filing the motion to remove counsel and asking his sister to file a complaint with the Board of Professional Responsibility.

The petitioner acknowledged that the trial court explained the terms of his plea agreement and sentence to him at the guilty plea hearing and that he told the court that he understood the terms of the agreement. However, he said that his understanding was that he would be sentenced to fifty-one years with the possibility of parole in as little as twelve to fifteen years. He testified that the day before accepting the plea, he had discussed with lead counsel the possibility of life with parole, and lead counsel had told him that it was possible to make parole in twelve to fifteen years. He acknowledged telling the trial court that he did not have any complaints with counsel's representation but said he was untruthful then because he "was backed into a wall" by his inability to have counsel removed.

On cross-examination, the petitioner testified that he remembered the trial court telling him that he could be punished by life imprisonment with fifty-one years before parole eligibility. However, he said that he thought it was merely "the way you talk legal" and that he did not know the law. On redirect examination, the petitioner testified that he first learned he would have to serve fifty-one years before becoming eligible for parole when he arrived at Brushy Mountain Correctional Complex after being sentenced.

The trial court subsequently entered a memorandum opinion denying the petitioner's motion, finding the following:

> The transcript of the pleas of guilty covers thirteen (13) pages and belies all the allegations of the petitioner.
>
> In it the petitioner acknowledges that he has a high school diploma and can read and write without difficulty, that he is in good health and not under the influence of alcohol or drugs, that he understands what he is charged with, that he understands what he is pleading guilty to, that his lawyers have spent a great deal of time explaining things to him, that he understands the consequences of going to trial and pleading guilty, that he is pleading guilty because he is guilty, that no force or threats of any kind have cause[d] him to plead guilty, that no promises have been made to cause him to plead guilty except the agreement stated on the plea papers, that he understands what the plea agreement is, that his sentence is to be a life sentence, that he is satisfied with the representation of him by his lawyers, that he has no complaint in any way about how the lawyers have represented him, and that there is nothing told or asked that he does not fully and completely understand.

. . . .

The transcript of the evidentiary hearing clearly shows that the lawyers were experienced in the handling of murder cases and specifically those involving the death penalty.

The record clearly shows that the lawyers spent a great deal of time preparing the case for trial and nothing is shown that they could have done additionally or better.

The crux of the present petition is the allegation that false representations were made by counsel as to how much time the petitioner would have to serve and that the petitioner would not have pled guilty but for those representations.

The petitioner says he understood he was pleading guilty to 51 years and would probably have to do about 20 years. He testified that he was advised by counsel that he would have to do 12 to 15 years before parole consideration and that if he didn't take the deal he would be "killed." Petitioner alleges that his lawyers exerted undue pressure on him.

The case turned from an almost certain trial to a plea after a co-defendant agreed to testify against the petitioner. The lawyers knew then that the case was not win[n]able and told the petitioner so.

One of the lawyers was away and did not have the opportunity to discuss the specific plea agreement with the petitioner.

Both lawyers testified that they did not pressure the petitioner into a plea.

The petitioner was informed explicitly of the danger he was facing in going to trial and what it meant to receive the death penalty.

All of this was simply the truth and the petitioner needed to know it and to understand it.

The attorney who culminated the agreement with the [S]tate and accompanied the petitioner at the plea voir dire says he never told the petitioner that he would serve anything less than 51 calendar years before being eligible for parole. The attorney testified that he specifically told the petitioner he would have to serve at least 51 calendar years.

This Court finds that the petitioner was not coerced into accepting the plea agreement, that no false promises were made to him regarding the length of service

of his sentences, that he had no conflict of interest with his counsel and that he did receive effective assistance of counsel.

This Court further finds from the credible evidence that the guilty pleas were entered voluntarily, understandingly, knowingly, and intelligently, that there was no misunderstanding as to their effect, that the pleas were not entered through fear or fraud, and that there was no denial of due process.

The petitioner has been unable to show or prove any manifest injustice and therefore the petition to set aside the guilty pleas is denied and the petitioner is not allowed to withdraw his plea.

ANALYSIS

The petitioner argues that he should have been allowed to withdraw his guilty pleas because a manifest injustice has occurred. He alleges that his counsel were ineffective and his pleas were not knowingly and voluntarily entered. The State responds that the trial court properly denied the petitioner's motion. As we shall explain, we agree with the State.

Tennessee Rule of Criminal Procedure 32(f)(1) provides that a trial court may grant a motion to withdraw a guilty plea "for any fair and just reason" before sentence is imposed, or to correct manifest injustice after the sentence is imposed but before the judgment becomes final. Manifest injustice is present where (1) the plea was entered as a result of fear, fraud, or misunderstanding; (2) the State failed to disclose exculpatory evidence as required by Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963); (3) the plea was not knowingly, understandingly, and voluntarily entered; or (4) the defendant was denied the effective assistance of counsel in connection with entering the plea. State v. Crowe, 168 S.W.3d 731, 742 (Tenn. 2005). Manifest injustice may exist in the absence of a constitutional violation, but where there is a denial of due process there is manifest injustice as a matter of law. Id. at 742-43. The decision whether to grant a motion to withdraw a plea of guilty rests with the sound discretion of the trial court and will not be reversed absent an abuse of discretion. State v. Drake, 720 S.W.2d 798, 799 (Tenn. Crim. App. 1986).

The petitioner argues that two of the four criteria for manifest injustice listed in Crowe are present in his case because his counsel were ineffective and his plea was unknowingly and involuntarily entered. We will address each claim in further detail.

I. Ineffective Assistance of Counsel

The right to effective assistance of counsel is safeguarded by the Constitutions of both the United States and the State of Tennessee. See U.S. Const. Amend. VI; Tenn. Const. Art. I, § 9. In order to determine the competence of counsel, Tennessee courts have applied standards developed in federal case law. See State v. Taylor, 968 S.W.2d 900, 905 (Tenn. Crim. App. 1997) (noting that the same standard for determining ineffective assistance of counsel that is applied in federal cases

also applies in Tennessee). The United States Supreme Court articulated the standard in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984), which is widely accepted as the appropriate standard for all claims of a convicted petitioner that counsel's assistance was defective. The standard is firmly grounded in the belief that counsel plays a role that is "critical to the ability of the adversarial system to produce just results." Id. at 685, 104 S. Ct. at 2063. The Strickland standard is a two-prong test:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687, 104 S. Ct. at 2064. The Strickland Court further explained the meaning of "deficient performance" in the first prong of the test in the following way:

> In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. . . . No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.

Id. at 688-89, 104 S. Ct. at 2065. The petitioner must establish "that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms." House v. State, 44 S.W.3d 508, 515 (Tenn. 2001) (citing Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996)). With regard to ineffective assistance claims, a trial court's findings of fact are entitled to substantial deference on appeal unless the evidence preponderates against them. Fields v. State, 40 S.W.3d 450, 456 (Tenn. 2001).

As for the prejudice prong of the test, the Strickland Court stated: "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694, 104 S. Ct. at 2068; see also Overton v. State, 874 S.W.2d 6, 11 (Tenn. 1994) (concluding that petitioner failed to establish that "there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different"). "In cases involving a guilty plea or plea of *nolo contendere*, the petitioner must show 'prejudice' by demonstrating that, but for counsel's errors, he would not have pleaded guilty but would have insisted upon going to trial." Hicks v. State, 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998) (citing Hill v. Lockhart, 474 U.S. 52, 59, 106 S. Ct. 366, 370 (1985); Bankston v. State, 815 S.W.2d 213, 215 (Tenn. Crim. App. 1991)). Hill explains the showing of prejudice which must be made by a petitioner who entered a guilty plea:

> In many guilty plea cases, the "prejudice" inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through a trial. For example, where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error "prejudiced" the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial.

474 U.S. at 59, 106 S. Ct. at 370.

The reviewing court must indulge a strong presumption that the conduct of counsel falls within the range of reasonable professional assistance, see Strickland, 466 U.S. at 690, 104 S. Ct. at 2066, and may not second-guess the tactical and strategic choices made by trial counsel unless those choices were uninformed because of inadequate preparation. See Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982).

The petitioner alleges myriad ways in which his counsel's representation was ineffective. He first asserts that lead counsel and co-counsel "could have done more to investigate the charges and work to develop a viable defense and were thus inadequately prepared to defend the case or to further gain a more favorable plea bargaining position." However, he does not explain which actions counsel failed to take and did not offer the favorable testimony of any material witness at the evidentiary hearing. Therefore, he has failed to establish that he was prejudiced by the allegedly inadequate investigation. See Black v. State, 794 S.W.2d 752, 757-58 (Tenn. Crim. App. 1990).

The petitioner contends that "although [lead counsel and co-counsel] filed numerous motions that said motions were boiler plate or form motions." Again, he does not explain which motions should have been prepared differently or how he was prejudiced by this tactic, and is therefore not entitled to relief on this claim.

The petitioner apparently challenges lead counsel's decision not to travel to Texas until July 2005, two months before trial. Once more, he does not state a claim under Strickland because he does not explain how his defense was prejudiced by the timing of the Texas trip.

Finally, the petitioner contends, based on a discrepancy between his time log and those of his attorneys, that they did not spend as much time with him as they claimed and submitted inaccurate time logs to the court. The trial court resolved this dispute in favor of the attorneys, finding that "[t]he record clearly shows that the lawyers spent a great deal of time preparing the case for trial and nothing is shown that they could have done additionally or better." The evidence does not preponderate against this finding.

We conclude that the record supports the determination of the post-conviction court that the petitioner failed to show that trial counsel was ineffective.

II. Knowing and Voluntary Plea

When analyzing a guilty plea, we look to the federal standard announced in Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (1969), and the state standard set out in State v. Mackey, 553 S.W.2d 337 (Tenn. 1977). State v. Pettus, 986 S.W.2d 540, 542 (Tenn. 1999). In Boykin, the United States Supreme Court held that there must be an affirmative showing in the trial court that a guilty plea was voluntarily and knowingly given before it can be accepted. 395 U.S. at 242, 89 S. Ct. at 1711. Similarly, in Mackey, our supreme court required an affirmative showing of a voluntary and knowledgeable guilty plea, namely, that the defendant has been made aware of the significant consequences of such a plea. Pettus, 986 S.W.2d at 542.

A plea is not "voluntary" if it results from ignorance, misunderstanding, coercion, inducements, or threats. Blankenship v. State, 858 S.W.2d 897, 904 (Tenn. 1993). The trial court must determine if the guilty plea is "knowing" by questioning the defendant to make sure he fully understands the plea and its consequences. Pettus, 986 S.W.2d at 542; Blankenship, 858 S.W.2d at 904.

The petitioner's argument in this regard appears to be an outgrowth of his overall dissatisfaction with his attorneys' representation. He states that he believed he had no choice but to enter a guilty plea because he lost confidence in his counsel. He asserts that his guilty pleas were coerced because his attorneys told him "they were going to kill me," and "you're stupid, you better take this, it's just a turkey shoot, you're the turkey." He argues that he entered a guilty plea not because he was guilty but because his attorneys could not or would not present an adequate defense for him. Finally, he alleges that he was not informed as to his sentence, because lead counsel told him that he would be eligible for parole in twelve to fifteen years.

However, as the petitioner concedes, the transcript of the guilty plea hearing reflects that his plea was knowingly and voluntarily entered:

THE COURT: What education do you have?

THE [PETITIONER]: Twelfth grade.

THE COURT: Diploma?

THE [PETITIONER]: Yes, sir.

THE COURT: You're able to read and write?

THE [PETITIONER]: Yes, sir.

. . . .

THE COURT: Anything about your health, physical, or mental condition that would cause you not to understand what we're doing here today?

THE [PETITIONER]: No, sir.

THE COURT: Have you had any alcohol or drugs in the last 24 hours?

THE [PETITIONER]: No, sir.

THE COURT: Do you understand what you're charged with?

THE [PETITIONER]: Yes, sir.

. . . .

THE COURT: Now, . . . your lawyers, . . ., have spent a great deal of time with you, I understand, and explained all of these things to you. Is there any aspect of it that you feel that you do not fully and completely understand?

THE [PETITIONER]: No, sir.

. . . .

THE COURT: Do you understand that you have a right to a jury trial, which no one can take from you unless you waive it?

THE [PETITIONER]: Yes, sir.

. . . .

THE COURT: Do you understand that you have an absolute right to plead not guilty but by pleading guilty, you give up all the rights I'm telling you about including the right to appeal?

THE [PETITIONER]: Yes, sir.

. . . .

THE COURT: Are you pleading guilty because you are guilty?

THE [PETITIONER]: Yes, sir.

THE COURT: Do you do so freely and voluntarily of your own free will?

THE [PETITIONER]: Yes, sir.

THE COURT: Any force or threats of any kind used against you to cause you to plead guilty?

THE [PETITIONER]: No, sir.

THE COURT: Any promises made to you except for this agreement that you've reached with the State?

THE [PETITIONER]: No, sir.

. . . .

THE COURT: Do you understand what the agreement that you've reached is?

THE [PETITIONER]: Yes, sir.

THE COURT: Did I correctly state it when I say that you will be sentenced to serve a determinant sentence of life with the possibility of parole in each count, those two counts to be served concurrently for a life sentence in each of the . . . counts? Is that your complete agreement and what you ask me to approve?

THE [PETITIONER]: Yes, sir.

THE COURT: Are you satisfied with the representation of you by your lawyers . . .?

THE [PETITIONER]: Yes, sir.

THE COURT: Any complaint in any way about how either of them have represented you?

THE [PETITIONER]: No, sir.

THE COURT: Anything that I have told you or asked you that you do not fully and completely understand?

THE [PETITIONER]: No, sir.

The court also explained each element of felony murder and that the State would be required to establish all elements beyond a reasonable doubt. The court discussed the range of possible

punishments, from the death penalty to punishments for lesser-included offenses. The petitioner testified that he understood all of this information.

In denying the petitioner's motion to withdraw his guilty pleas, the trial court found that "the guilty pleas were entered voluntarily, understandingly, knowingly and intelligently, that there was no misunderstanding as to their effect, that the pleas were not entered through fear or fraud, and that there was no denial of due process." The court resolved the conflicting testimony of the petitioner and his counsel in favor of counsel, finding that the petitioner was neither pressured into entering his pleas nor misinformed about the length of service of his sentence. The evidence does not preponderate against this finding, and, accordingly, we conclude that the petitioner did not carry his burden of demonstrating that his pleas were unknowingly and involuntarily entered.

CONCLUSION

Because the petitioner has not established that manifest injustice resulted from his guilty pleas, we conclude that the trial court did not abuse its discretion in refusing to allow the petitioner to withdraw his pleas. Therefore, based upon the foregoing authorities and reasoning, we affirm the judgment of the trial court.

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ALAN E. GLENN, JUDGE